UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:

Gary Dale Smith and
Maryjo Smith,
Debtors.
_____/

Case No.: 17-55968
Chapter 7
Hon. Mark A. Randon

Wimsatt Building Materials Corporation,
Plaintiff,

v.

Gary Dale Smith,
Defendant.
_____/

Adversary Proceeding
Case No.: 18-04027

OPINION AND ORDER DENYING CROSS MOTIONS FOR SUMMARY JUDGMENT (DKT. NOS. 28 AND 31)

I. INTRODUCTION AND BACKGROUND

Distinctive Home Improvement, LLC made exterior renovations to residential and commercial buildings with a focus on roofing. Wimsatt Building Materials Corporation was one of Distinctive's primary suppliers of material. In 2010, Wimsatt entered into a Credit Agreement with Distinctive, through its corporate officer, Gary Smith. Wimsatt alleges that although it provided materials to Distinctive as ordered, Distinctive accumulated a significant outstanding account balance, which remains unpaid ("the debt").

On September 29, 2017, Distinctive filed Chapter 7 bankruptcy; Smith's personal

Chapter 7 bankruptcy followed 48 days later. In response, Wimsatt filed this adversary proceeding in Smith's bankruptcy alleging that the debt is nondischargeable under section 523(a)(4) of the Bankruptcy Code.[1] Specifically, Wimsatt contends the debt arises from Distinctive's violations of the Michigan Building Contract Fund Act ("MBCFA"), MICH. COMP. LAWS § 570.151, which creates a fiduciary obligation requiring Distinctive to first allocate funds received for a specific project to pay for the materials used on that project, and imposes personal liability on Smith for failing to do so. Cross motions for summary judgment are pending; the Court heard argument on September 10, 2018.

Because genuine issues of material fact remain, both motions are **DENIED**.

II. STANDARD OF REVIEW

Under Rule 56 of the Federal Rules of Civil Procedure, made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7056, summary judgment must be granted "if the movant shows that there are no genuine issues as to any material fact in dispute and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *CareToLive v. Food & Drug Admin*., 631 F.3d 336, 340 (6th Cir. 2011). The standard for determining whether summary judgment is appropriate is whether "the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Pittman v. Cuyahoga Cnty. Dep't of Children Services*, 640 F.3d 716, 723 (6th Cir. 2011) (quoting *Anderson v. Liberty Lobby, Inc.*, 477

[1]Wimsatt voluntarily dismissed its section 523(a)(2)(A), embezzlement, and conversion counts.

U.S. 242, 251-52 (1986)).

The Court must draw all reasonable inferences in favor of the party opposing the motion. *Pluck v. BP Oil Pipeline Co.*, 640 F.3d 671, 676 (6th Cir. 2011). However, the nonmoving party may not rely on mere allegations or denials, but must "cit[e] to particular parts of materials in the record" as establishing that one or more material facts are "genuinely disputed." Fed. R. Civ. P. 56(c)(1). A mere scintilla of evidence is insufficient; there must be evidence on which a jury could reasonably find for the non-movant. *Hirsch v. CSX Transp., Inc.*, 656 F.3d 359, 362 (6th Cir. 2011).

III. ANALYSIS

A. There is a Genuine Issue of Material Fact as to Whether Distinctive Violated the MBCFA

"The [MBCFA] imposes a trust on funds paid to contractors and subcontractors for products and services provided under construction contracts." *Midwest Eng'g v. SWS Eng'g*, No. 254148, 2005 WL 1459613, at *1 (Mich. App. June 21, 2005). To establish a violation of the MBCFA, the following elements must be satisfied: (1) Distinctive is a contractor in the building construction industry; (2) a person paid Distinctive for labor or materials to be used on the construction project; (3) Distinctive retained or used a portion or all of the funds; (4) for any purpose other than to first pay laborers, subcontractors or materialmen; (5) who were engaged or hired by Distinctive for the construction project. *Comfort Control Supply Co., Inc. v. Hunter (In re Hunter)*, 437 B.R. 239, 244 (Bankr. W.D. Mich. 2010).

There is a shifting burden of proof under the MBCFA: Wimsatt must first establish that it provided supplies for use on a specific construction project and that Distinctive was paid by its customers for the specific construction project where the supplies were used. If Wimsatt establishes these elements, the burden shifts to Smith to show that he did not defalcate the funds received in trust. *Astro Bldg. Supplies, Inc. v. Slavik*, 433 B.R. 651, 664 (E.D. Mich. 2010), *aff'd* 443 F. App'x 993 (6th Cir. 2011).

The MBCFA does not apply to open-ended credit arrangements between a contractor and supplier of materials:

> An "open account", "line of credit", or other open-ended credit arrangement whereby a supplier delivers materials to a builder or contractor for use in whatever projects the builder undertakes, and payment is received from the ongoing proceeds generated by the builder or contractor's business, rather than payments from specifically identified projects, does not create a fiduciary obligation between a supplier and a builder.

Astro Bldg. Supplies, Inc. v. Slavik (In re Slavik), 426 B.R. 711, 717 (Bankr. E.D. Mich. 2010), *aff'd* 433 B.R. 651 (E.D. Mich. 2010). "Because the [MBCFA] only imposes a trust on specific funds, to establish the existence of a trust in the first instance the plaintiff must identify both the specific project in which the supplies were used and the specific payment received by the defendant contractor." *Slavik*, 433 B.R. at 663.

Both parties agree that Wimsatt supplied the materials to Distinctive on an "open account." But they disagree as to its operation. Smith says the "open account" functioned as a debtor-creditor relationship whereby Wimsatt would send invoices on a monthly basis, Smith would send a payment to Wimsatt, and Wimsatt would apply the

payment as it saw fit–sometimes applying payments to older invoices. Wimsatt suggests Distinctive was billed on a per project basis and specifically identified 18 projects–totaling $41,973.10–that remain unpaid.

Smith produced evidence that Wimsatt billed Distinctive on a monthly basis and applied payments to older projects (invoices) instead of billing on a per project basis. For example, Distinctive's accounts receivable payment inquiry shows Wimsatt applied payments made in 2017 to invoices from 2016. In addition, Smith's affidavit says:

> 15. Wimsatt has always invoiced me monthly and asked for payments on a monthly basis. If Distinctive was late on a payment, it would make collection and dunning calls.
>
> 16. The sales and management of Wimsatt always asked Distinctive to pay the oldest bills first so that Distinctive could maintain the account. Expenses were paid on a monthly basis out of deposits. With respect to Wimsatt, Distinctive was billed monthly and it paid accordingly.

According to the Terms and Conditions of Sale, "[Distinctive] hereby authorizes [Wimsatt] to apply any payments made by or on behalf of [Distinctive] to [Wimsatt] to any account or accounts then outstanding between [Distinctive] and [Wimsatt]." Finally, a text message from "Debbie" at Wimsatt says "Good morning. Month end is Friday. If I send you a break down will you see what you can get us for then?"

On the other hand, Wimsatt produced invoices for specific projects that it says remain unpaid. The invoices describe the materials shipped to specific job sites and the amount owed for the particular materials provided. They were also included on the monthly billing statements.

The Court, therefore, finds genuine issues of material fact remain as to the nature of the billing arrangement between Wimsatt and Distinctive which preclude judgment as a matter of law on the existence of a fiduciary relationship under the MBCFA. The Court needs additional testimony on this issue.[2]

B. There is a Genuine Issue of Material Fact as to Whether Smith is Personally Liable under the MBCFA

Corporate officers who "participate[] in violating" the MBCFA by misappropriating funds can be held liable. *People v. Brown*, 239 Mich. App. 735, 740 (2000). However, Smith's affidavit identifies other individuals who had access to Distinctive's funds. Smith claims he did not always receive customer payments: sometimes he was out of the office when payments were received. As such, there is a question of fact regarding whether Smith is personally liable under the MBCFA.

C. There is a Genuine Issue of Material Fact as to Whether Smith's Actions were Intentional

Finally, *Bullock v. BankChampaign*, 569 U.S. 267 (2013) requires Wimsatt to additionally prove intent under section 523(a)(4):

> where the conduct at issue does not involve bad faith, moral turpitude, or other immoral conduct, the term requires an intentional wrong. We include as intentional not only conduct that the fiduciary knows is improper but also reckless conduct of the kind that the criminal law often treats as the equivalent. Thus, we include reckless conduct of the kind set forth in the

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[2]Smith also asserts that Wimsatt did not suffer any losses because Distinctive paid over $45,000.00 during the time Wimsatt claims it is owed $41,973.10. Again, the Court needs additional testimony as to how the $45,000.00 was applied.

> Model Penal Code. Where actual knowledge of wrongdoing is lacking, we consider conduct as equivalent if the fiduciary "consciously disregards" (or is willfully blind to) "a substantial and unjustifiable risk" that his conduct will turn out to violate a fiduciary duty. That risk "must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a *gross deviation* from the standard of conduct that a law-abiding person would observe in the actor's situation."

Bullock, 569 U.S. at 273-74 (internal citations omitted) (emphasis in original). Intent is generally a question of fact: "summary judgment is particularly inappropriate when intent is at issue, because evidence of intent must generally be inferred from the surrounding facts and circumstances." *Marohnic v. Walker*, 800 F.2d 613, 617 (6th Cir. 1986).

There is a genuine issue of material fact as to whether Smith's participation in Distinctive's alleged violation of the MBCFA, if any, was intentional. The Court will decide this issue after it has had an opportunity to evaluate the witnesses' credibility and demeanor at trial.

IV. CONCLUSION

Because genuine issues of material fact remain, both motions are **DENIED** consistent with this opinion. The Court will hold a trial on the section 523(a)(4) count on ***September 27, 2018, at 10:00 a.m***.

IT IS ORDERED.

Signed on September 20, 2018

/s/ Mark A. Randon

Mark A. Randon
United States Bankruptcy Judge